Supreme Court, U.S.
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No. 871206

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

LEO HIMMELSBACH
District Attorney

KENNETH ROSENBLATT
Deputy District Attorney

Office of the District Attorney,
Santa Clara County
70 West Hedding St.
San Jose, California 95110
(408) 299-7400

QUESTION PRESENTED

Whether 28 U.S.C. 1442(a)(1) allows a federal employee charged with committing a misdemeanor traffic offense while on duty to remove the ensuing prosecution to federal court where the alleged violation is unrelated to any rights, duties, privileges, immunities, or defenses provided under federal law?

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STATEMENT

Petitioners Kathryn Mesa and Shabbir Ebrahim were charged with misdemeanor traffic offenses in unrelated cases arising out of their driving while on duty as federal employees. Each filed petitions for removal based solely upon their having been on duty when the incidents occurred. Neither petitioner alleged that their acts were justified by, or depended upon, federal law. There has been no suggestion that these prosecutions were motivated by animus toward federal officials or federal law.

These are typical traffic cases. The only distinguishing feature is that the allegedly negligent drivers are federal employees.

The United States District Court for the Northern District of California simultaneously granted the petitions and denied the State of California's motions for remand. The State of California (hereinafter referred to as "California") sought review by the Ninth Circuit Court of Appeals by direct appeal and mandamus.

The Ninth Circuit held that mandamus was available to challenge the District Court's decision, and petitioners do not seek review of that ruling. The Ninth Circuit found that removal was prohibited by this Court's decision in *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33-35 (1926) (hereinafter referred to as "*Soper (No. 1)*"), requiring that the employee have alleged in his petition a defense to the charges relying upon federal law. *People of the State of*

California v. Mesa, 813 F.2d 960, 965 (9th Cir. 1987). The Circuit found *Soper (No. 1)* controlling, and thus did not rely upon other authority.

The Circuit also found petitioner's reliance upon a more recent decision to have been misplaced. *See Willingham v. Morgan*, 395 U.S. 402 (1969). The Circuit noted that the defendants in that civil case had also raised a federal defense (i.e. sovereign immunity). *Mesa*, at 966.

Although some of the language in *Willingham*, if applied literally, could support removal in all traffic cases, the court declined to supplant *Soper (No. 1)* by taking that language from a civil case and "casually" applying it to this criminal case. *Id.*, at 966.

Petitioners claim that the Ninth Circuit has misinterpreted section 1442(a)(1), and seek review by this Court. *See* Petition For A Writ of Certiorari (hereinafter referred to as "Petition").

THE PETITION SHOULD BE DENIED

Although there is a split between the Ninth and Third Circuits,[1] not all such disagreements merit the

[1] Petitioners have incorrectly asserted that several Circuits have disagreed with the decision below. The only decision directly in conflict is *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246 (3d Cir. 1980). The Sixth Circuit followed *Newcomer* in finding that a federal defense is unnecessary in a *civil* case. *See Stein-Sapir v. Birdsell*, 673 F.2d 165 (6th Cir. 1982). That finding was *dicta* because the federal official had alleged a federal defense (sovereign immunity).

The Tenth Circuit decision in *City of Aurora v. Erwin*, 706 F.2d 295 (10th Cir. 1983) is irrelevant because the prosecution in that case did not contest the removal. Nonetheless, petitioners infer from the facts of that case that there was no federal defense available to support removal.

There are three problems with petitioner's interpretation. First, it appears that the dog and its owner were interfering with mail delivery (unlike the bicyclist and police vehicle in our cases). *Id.*, at 295 n.1. The mail carrier could rely upon his federal authority and duty to deliver the mail free of interference as a federal defense to the State charges.

Second, the Tenth Circuit recited the record as it appeared after conviction in federal court. Defendant's removal petition surely presented a stronger showing justifying removal than did the court's summary. We cannot speculate whether defendant's petition would have presented a sufficient showing had removal been contested.

Finally, if petitioners wish to rely upon *Aurora*, they must explain that court's statement that section 1442(a)(1) "is intended to provide a forum free from local interests and prejudice in which the federal officer *can assert immunity defenses based on official conduct.*" Id., at 296 (emphasis added) (quoting *Arizona v. Manypenny*, 451 U.S. 232 (1981); *Manypenny* is discussed *infra*).

attention of this Court. The more recent ruling from the Ninth Circuit allows removal where it matters: federal officials alleging federal defenses are still absolutely entitled to removal. State sovereignty remains intact, and yields only to cases invoking the Supremacy Clause.

This is not one of those cases. At stake here is the Solicitor General's claim that Congress intended to create a national federal court for federal employees. The Ninth Circuit's ruling rejecting that argument does not create an emergency demanding

immediate review by this Court. This Court should defer consideration of this issue until other Circuits have addressed our problem in light of the Ninth Circuit's analysis.

Furthermore, the Ninth Circuit's ruling merely restored the *status quo* established by this Court's decisions since 1867. The legislative history of section 1442(a)(1) and the relevant Supreme Court decisions establishes that Congress and this Court have always recognized that the removal statute required a federal defense.

The federal defense requirement is also supported by common sense. The prospect of hundreds or thousands of employees removing simple traffic or parking tickets to federal court is absurd. Removal in the absence of a federal defense will burden the federal judiciary unnecessarily while invading State sovereignty.

Petitioners present three arguments in favor of removal in the absence of a federal defense. First, that the "plain terms" of section 1442(a)(1) mandate removal in the absence of a federal defense. *See* Petition, at 5. Second, that the "causal connection" language employed in *Willingham* controls this case because there is no logical distinction between civil and criminal cases. Petition, at 6-7. Finally, petitioners assert that the Ninth Circuit's ruling must be incorrect because it will allow State harassment of federal officials. Petition, at 9-10. A brief

discussion of each argument reveals its shortcomings.[2]

There Are No "Plain Terms" Of Section 1442(a)(1)

The statute allows removal for acts "under color of office". Congress never defined that inherently ambiguous phrase. Had Congress wished to allow removal for acts committed in while in performance of federal duties, it would have said so. Indeed, as discussed below, Congress used that language in allowing removal for court officers. *See* 28 U.S.C. 1442(a)(3). Since the statute is ambiguous, the legislative history of section 1442(a) is dispositive in determining Congressional intent.

The History of Section 1442(a) Supports The Federal Defense Requirement

The early removal statutes were enacted as reactions to State defiance of federal law. The first removal statute, the Act of February 4, 1815, 3 Stat. 198 ("1815 Act"), was proposed to protect federal customs agents in their enforcement of federal law. The only available legislative history for that Act consists of a letter from its proponent, the Secretary

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[2] California presents a brief synopsis of its position on the merits to persuade this Court that the Ninth Circuit's decision is clearly correct. California will present these and other arguments in a more complete form should this Court decide to hear this case.

of the Treasury. *See* Annals of Congress, 13th Cong., 3d Sess., at 757-61 (also appearing in the American State Papers, 1802-1815, Finance, at 881). The Secretary related that the State of Vermont was frustrating the enforcement of federal law by insisting upon a niggardly construction of federal customs laws. Vermont courts routinely granted civil judgments against customs officials for seizures mandated by federal law. Under the Judiciary Act of September 24, 1789, decisions in civil cases could only be removed to federal courts after the judgment was affirmed by the highest court in the State. That delay would have allowed the State to forestall review until after the War ended.

The Secretary wanted to allow removal of civil cases before adjudication by any State court. *Id.*, at 760. But he clearly intended his remedy to encompass only those cases where the customs official relied upon federal law.

"A more effectual provision should be made for transferring, from the State courts to the Federal courts, suits brought against *persons exercising an authority under the United States,* so that such suits may be transferred, as soon as conveniently may be, after they are commenced."

Id., at 761 (emphasis added). Congress passed the 1815 Act, which allowed certain officials to remove civil and criminal cases where the charged acts were "agreeable to the provisions of this act, or under colour thereof..." 1815 Act, sec. 8.

There is no evidence that Congress intended to expand the previously limited powers of removal under the Judiciary Act to encompass every miscellaneous tort or petty offense committed by a customs official while on duty. Congress would not have attempted to expand the federal jurisdiction to include cases presenting no federal issues when the appellate jurisdiction of this Court to hear federal question cases removed from State courts was in dispute. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).

The 1815 Act was a temporary measure and expired after the War of 1812. It was revived during the next State-Federal conflict, when South Carolina purported to nullify the federal tariff by passing the Nullification Act in 1832. *See* Act of March 2, 1833, 4 Stat. 632, sec. 3 ("1833 Act"). The Senate debate indicates that Congress did not intend to expand federal jurisdiction. *See* 9 Congressional Debates, Part II, 22nd Cong., 2d Sess., 260, (Remarks of Senator Wilkins), 419 (Senator Dallas), 590 (Senator Webster). The 1833 Act tracked the language of the 1815 Act.

The next federal official removal statute was enacted during the Civil War. The Act of March 3, 1863, sec. 5, 12 Stat. 756, provided for removal where the official acted "by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." *Id.* There is no room for quibbling; this statute "by its plain terms" required a federal defense.

This Court formally confirmed the federal defense requirement in *The Mayor v. Cooper*, 73 U.S. 247 (1867). The Court upheld the constitutionality of the removal statute based upon the power of federal courts to hear federal questions. *Id.*, at 252-53.[3]

The next removal statutes were part of internal revenue laws.[4] The Act of July 13, 1866 was the first removal statute to allow removal for acts "under color of office". Congress did not discuss the new language, and this Court's view of the federal defense requirement did not change. "That the act of Congress does provide for the removal of criminal offenses against the State laws, *when there arises in them the claim of the Federal right or authority, is too plain to admit of denial.*" *Tennessee v. Davis*, 100 U.S. 257, 261, 271, 272

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[3] *The Mayor v. Cooper* considered the 1863 Act as amended by the Act of May 11, 1866, 14 Stat. 46. The changes to the Act were not significant for our issue.

[4] The 1833 Act applied only to collection of duties on imports. The Internal Revenue Act of June 30, 1864, ch. 173, section 50, 13 Stat. 241 ("1864 Act"), provided that the 1833 Act was to be "taken and deemed as extended to and embracing all cases arising under the laws for the collection of [revenue]." That provision was repealed and replaced in 1866 with a different removal statute. *See* Act of July 13, 1866, ch. 184, section 67, 14 Stat. 98, 171 ("1866 Act"), *Gay v. Ruff*, 292 U.S. 25 n.8 (1934). That Act was codified in 1874 as section 643 of the Revised Statutes, and recodified as Section 33 of the Judicial Code of 1911, 36 Stat. 1097.

(1880) (emphasis added).[5] Petitioners' error concerning "the plain terms" of section 1442(a) is demonstrated most convincingly by section 1442(a)(3), allowing court officers to remove civil and criminal actions "for or on account of any act done under color of his office *or in the performance of his duties as such officer*." Act of August 23, 1916, ch. 399, section 33, 39 Stat. 532 (emphasis added). The apparent distinction created by 1442(a)(3) between acts "under color of office" and "in performance of duties" indicates that merely being on the job is insufficient for all officials except court officers.[6]

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[5] The Court upheld the constitutionality under Article III of the 1874 codification of the 1866 Act based upon the assumption that a federal defense was required for removal. Petitioners are incorrect in stating that self-defense arising out of enforcement of federal law is "a state defense". *Compare* Petition, at 7 with *Davis* , at 261, and *Maryland v. Soper (No. 2)*, 270 U.S. 36, 42 (1926) ("such acts of defense are really part of the exercise of his official authority. They are necessary to make the enforcement effective.").

[6] Moreover, this Court has interpreted section 1442(a)(3) restrictively to allow removal only when federal authority is at stake; court officers may remove only those cases arising out of their execution of court orders. *See Gay v. Ruff*, 292 U.S. 25 (1934) (denying removal to a federally appointed receiver sued for negligence). This Court held that Congress did not intend to expand federal jurisdiction in adding section 1442(a)(3). *Id.*, at 37-38. The Court also denied removal under 1442(a)(1) because the official did not allege a federal defense to the suit. *Id.*, at 39, *see also Colorado v. Symes*, 286 U.S. 510, 518 (1932) (denying removal because officials "are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law").

Although Congress amended section 1442(a)(1) in 1948 to include "[a]ny officer of the United States or any agency thereof", the present statute still only allows removal for acts "under color of such office". The Reviser's Note states only that the right of removal was extended to all federal employees; there is no evidence that Congress altered the parameters of that protection. Sections revised in that 1948 Revision of the Judicial Code "will be presumed to bear the same meaning as did the original sections, unless an intent to change the meaning is clearly and indubitably manifested." *Peerless Casualty Co. v. United States*, 344 F.2d 495, 496 (D.C. Cir. 1964).

Thus, the legislative history of section 1442(a) and the decisions of this Court over the last 100 years clearly refute petitioners' claims.

Willingham v. Morgan Supports The Federal Defense Requirement

Petitioners first argue that this Court's "causal connection" test defines the standard for removal in civil cases. They then suggest that this test must apply to criminal cases because section 1442(a)(1) on its face does not distinguish between civil and criminal cases. Applying that standard in criminal cases would eliminate the federal defense requirement.

Petitioners' first premise is flawed. The "causal connection" test in *Willingham* does not go

to whether a federal defense is required in civil and criminal cases. Every Supreme Court case since *The Mayor v. Cooper*, *supra*, has reaffirmed that requirement. The "causal connection" test defines what facts must be alleged to put the federal defense into issue.

That is the import of *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), where this Court had to decide whether a federal official could deny having committed the charged act and still obtain removal. The federal prohibition officers had found a slain man while on duty, and were charged with murder. They denied knowledge of the killing, but requested removal because they were on duty when they found the body.

Soper (No. 1) assumed the federal defense requirement. Thus, the Court rejected the officials' affidavits on the grounds that "[t]hese averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties." *Id.*, at 35, *see Mesa*, at 965.[7]

The Court's concern was over how a federal official ignorant of the facts surrounding the incident could deny the charges and still allege a federal defense. The Court fashioned a very strict test because of the "exceptional" nature of the

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[7] Thus, petitioners' reliance upon *Soper (No. 1)* is misplaced. *See also* Petition, at 9 (quoting *Soper (No. 1)* that the removal statute was designed to prevent interference with federal officials *enforcing* federal law).

removal remedy.[8] The official had to demonstrate the "causal connection" by: 1) detailing all of his actions and showing that each act was in enforcement of, or in compliance with, federal law; and 2) negating the possibility that he was prosecuted for an act unprotected by federal law. *Id.*, at 33-34.

By doing so, the official declared that the only basis of the prosecution was either: 1) an act protected by a federal defense; or 2) his mere presence as a federal official at the scene while enforcing federal law. *Id.*, at 33. A prosecution motivated only by the official's presence enforcing federal law would violate the Supremacy Clause and present a federal defense.

Petitioners' confusion over the "causal connection" test results from the emergence of the sovereign immunity defense after *Soper (No. 1)*. That defense only requires that the federal employee have acted with discretion within the scope of his employment. *See Westfall v. Erwin*, 484 U.S. __ (1988), *Barr v. Matteo*, 360 U.S. 564 (1959).

The federal officials in *Willingham* alleged the sovereign immunity defense. Id., at 404, 409. This Court quoted *Tennessee v. Davis, supra*, in

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[8] *Id.*, at 35. The Court required officials to waive their Fifth Amendment rights and be "candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer." *Id.*, at 34, 35. Such a waiver would not be necessary if an official could obtain removal solely by stating he was on duty because such a statement could not be inculpatory.

support of the federal defense requirement, noting that the purpose of the removal statute was to prevent State prosecutions of federal officials "for an alleged offence against the law of the State, *yet warranted by the Federal authority they possess.*" *Willingham*, at 406 (emphasis added). The sovereign immunity defense can be included within this category because it immunizes federal officials for discretionary acts within their authority. Petitioners fail to allege a federal defense in our case.

Willingham also addressed the more difficult question of how to put the sovereign immunity defense in issue. This Court noted that it had held in *Soper (No. 1)* that the officials could deny having committed the charged acts. However, the strict "causal connection" test defined in that case posed a dilemma in a civil case, where the federal prison officials would be forced to describe all contacts with petitioners. *Id.*, at 407-09.

The solution was simple for civil cases. A showing that an official acted within the scope of his employment establishes the sovereign immunity defense. An allegation that the official was on duty therefore puts the defense in issue. Thus, the allegation in *Willingham* that the officials were on duty at the place of their employment at all relevant times established the "causal connection" and was sufficient to allege the sovereign immunity defense. Id., at 409.

Footnote 4 of *Willingham* merely cautioned that this easy formula might not apply to criminal cases, where sovereign immunity is not a defense.

The only analogous defense to a criminal charge is the federal immunity defense. But that defense requires the official to do more than establish that he was on duty at the time of the incident. He must show that his actions were necessary and proper to carry out his federal authority. *See Morgan v. People of the State of California*, 743 F.2d 723, 733 (9th Cir. 1984). Petitioners do not raise a federal defense.

This Court recently reiterated the federal defense requirement in *dicta*. "Federal involvement is necessary in order to insure a federal forum, *but it is limited to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law.*" *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (allowing a State to appeal a judgment of acquittal rendered by a federal court in a case removed under section 1442(a)(1)) (emphasis added).

Petitioners miss the point by arguing (incorrectly) that *Manypenny can* be read as supporting their views. *See* Petition, at 6 n.2. The legislative history indicates Congress intended to require a federal defense; strained constructions of Supreme Court cases are an inadequate response.

In sum, petitioners are correct that there is no distinction between civil and criminal cases regarding the issue at bar: the federal defense requirement exists in all cases. The Third Circuit in *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246 (3d Cir. 1980), reached the wrong result

because it misinterpreted *Willingham*.[9] That error has already been rectified by the Ninth Circuit's decision below and does not require this Court's attention.

The Ninth Circuit has clearly interpreted *Willingham* (along with *Soper (No. 1)*), as having maintained the federal defense requirement. *Mesa, supra*, at 965, 966. That it may have also relied incorrectly upon Footnote 4 of *Willingham* in *dicta* as additional refutation of petitioners' reading of that case may be regrettable, but is hardly reason for this Court to expend its scarce resources by granting a hearing. The Ninth Circuit has restored the *status quo;* this Court should wait to see if other Circuits

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[9] The Third Circuit also stated that the removal statutes "were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of federal government by the state." *Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d 246, 250. As discussed above, the court was clearly incorrect. The court's only authority was a law review article. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L.Rev. 739 (1965).

This excellent article touches on our statute in its discussion of the civil rights removal statute (28 U.S.C. 1443). Professor Amsterdam did not support the Third Circuit's interpretation of Congressional intent, although he noted that Congress intended to protect both federal law and federal officials. *See* Amsterdam, at 807, 808, n.70. The Third Circuit failed to explain Professor Amsterdam's remark that a defendant seeking removal under section 1442(a)(1) must show colorable protection under federal law. *Id.*, at 874 n.328 (citing *Tennessee v. Davis, supra*).

fail to adhere to the federal defense requirement before entering this area.

The Decision Below Will Not Allow State Harassment of Federal Officials

Petitioners suggest that the decision below will allow States to harass federal officials. Petition, at 10 n.4. First, as noted by the Ninth Circuit, there is no claim of harassment in this case; this Court can always review such a case when and if it arises. Second, the Ninth Circuit specifically stated that it might allow removal if harassment were alleged. *Mesa*, at 967.

Third, the "causal connection" test in *Soper (No. 1)* provides an adequate means of obtaining removal where the official is harassed while on duty. The official need only show that his actions were in enforcement of, or compliance with, federal law and negate the possibility that he was prosecuted for an act unprotected by federal law. *Id.*, at 33-34. The Court has already ruled that this test applies where harassment is alleged. *Compare Soper (No. 1)* with *Maryland v. Soper (No. 2)*, 270 U.S. 36 (1926).

Finally, removal is only one of the mechanisms protecting federal officials from harassment. The writ of *habeas corpus* is a potent and more useful weapon against harassment. *See* 28 U.S.C. 2241(c)(2) and (c)(3), *In Re Neagle*, 135 U.S. 1 (1890). The federal official does not have to wait until trial to win his freedom because abstention does

not apply. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906). The procedure is economical because only the harassment claim is removed for adjudication.

Removal is useful to prevent State adjudication of federal defenses; *habeas corpus* is available to prevent harassment of federal officials generally. It is enough for our purposes that the Ninth Circuit's decision protects all federal officials who allege a federal defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LEO HIMMELSBACH
District Attorney for the
County of Santa Clara,
State of California

KENNETH ROSENBLATT
Deputy District Attorney

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